Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

(3)

No. 90-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ERBAUER CONSTRUCTION CORPORATION,
Petitioner,
- versus -
PAN AMERICAN LIFE INSURANCE COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

WAYNE FISHER
Counsel of Record
DAVID W. HOLMAN
FISHER, GALLAGHER & LEWIS
70th Floor
1000 Louisiana
Houston, Texas 77002
(713) 654-4433
DON A. WETZEL
WETZEL & HERRON
Suite 300, The Millside Building
2170 Buckthorne Place
The Woodlands, Texas 77380
(713) 363-5050
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does the Employee Retirement Income Security Act of 1974 (ERISA) preempt state law claims of an employer, who is not empowered to bring a civil action under ERISA?

2. Does ERISA preemption of an employer's state law claims, without an alternative federal remedy, deny the employer's constitutional right of access to the courts?

Respondent asserts that these questions were not properly raised or decided by the court below. As will be seen, these questions were central to the decision below.

LIST OF PARTIES

The names of all parties are included in the caption. Sup. Ct. R. 14.1(b).

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Authorities	iv
Introduction	1
Factual Clarifications	2
Reply	3
1. *The Questions Presented Were Properly Raised Before the Texas Supreme Court*	3
2. *The Texas Supreme Court's Flawed Jurisdictional Analysis Conflicts with Numerous Opinions*	5
Conclusion	9

TABLE OF AUTHORITIES

	Page
United States Supreme Court Cases:	
Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930)	5
Chambers v. Mississippi, 410 U.S. 284 (1973)	4
Cole v. Arkansas, 333 U.S. 196 (1948)	5
Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)	6,7
Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)	5
Illinois v. Gates, 462 U.S. 213 (1983)	4
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	4
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	6
Raley v. Ohio, 360 U.S. 423 (1959)	4
Street v. New York, 394 U.S. 576 (1969)	4
United Const. Workers v. Laburnum Const. Corp., 347 U.S. 656 (1954)	6,7
United States Courts of Appeals Cases:	
Giardono v. Jones, 867 F.2d 409 (7th Cir. 1989)	6,8
Grand Union Co. v. Food Employers Labor Relations, 808 F.2d 66 (D.C. Cir. 1987)	6
Great Lakes Steel Steel v. Deggendorf, 716 F.2d 1101 (6th Cir. 1983)	6
Gulf Life Ins. Co. v. Food Employers, 809 F.2d 1520 (11th Cir. 1987)	6
Hermann Hospital v. MEBA Medical Benefits Plan, 845 F.2d 1286 (5th Cir. 1988)	6
Kwatcher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989)	5
Plucinski v. I.A.M. National Pension Fund, 875 F.2d 1052 (3d Cir. 1989)	6
Pressroom Unions Fund v. Continental Assurance, 700 F.2d 889 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983)	5
Provident Life and Accident Ins. Co. v. Waller, 906 F.2d 985 (4th Cir.), *cert. denied*, 111 S. Ct. 512 (1990)	6
United States District Court Cases:	
Central States Southeast & Southwest Areas Pension Fund v. Admiral Merchants Motor Freight, Inc., 511 F. Supp. 38 (D. Minn. 1980), *aff'd sub nom*, 642 F.2d 1122 (8th Cir. 1981)	6
Munoz v. Prudential Ins. Co. of America, 633 F. Supp. 564 (D. Colo. 1986)	6

Page

Rules and Statutes:

29 U.S.C. § 1132(a) 7
Sup. Ct. R. 14.1(b) ii
Tex. R. Civ. P. 299 7

NO. 90-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ERBAUER CONSTRUCTION CORPORATION,
Petitioner,

- versus -

PAN AMERICAN LIFE INSURANCE COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

Petitioner, Erbauer Construction Corporation (Erbauer), files this brief in reply to the Brief in Opposition filed by Respondent, Pan American Life Insurance Company (Pan American), and again asks this Court to grant the petition.

INTRODUCTION

Pan American's main thrust in opposition appears to be the contention that the Texas Supreme Court did not decide the questions presented, so that Erbauer is not entitled to present the questions here, but must refile its suit in federal court. In other words, Pan American would send Erbauer off to the very courts which have held that there is no federal jurisdiction over the claims. By this tactic, Pan American hopes to condemn Erbauer to some judicial purgatory where claims can never be heard.

A review of the record reveals that Erbauer's jurisdictional and constitutional questions were properly raised below and should be resolved here. The Texas Supreme Court's finding of ERISA

preemption rests on a flawed jurisdictional analysis which is in direct conflict with the vast majority of courts which have considered the issue. The questions presented here are of central concern to the problems of ERISA jurisdiction.

Moreover, the questions presented here are of enduring importance to courts and litigants. The lower courts need direction in the resolution of these problems in order to avoid repetition of the error committed below, and in order to avoid the denial of a remedy to hundreds of thousands of tort victims like Erbauer.

Erbauer will first clarify the facts as presented by Pan American. Erbauer will then respond directly to the contentions raised by Pan American.

FACTUAL CLARIFICATIONS

1. *Backdating.*

In what appears to be an effort to justify its tortious conduct, Pan American's statement of "pertinent facts" focuses on "backdating." What Pan American fails to point out, but what was clear to the jury, is that Erbauer's employees backdated the enrollment cards at the specific request and direction of Pan American so that Pan American could reap greater premiums from the policy (S.F. 89, 94, 97, 370-74, 554, 674). Mark Foster of Pan American specifically directed the backdating in this case (S.F. 89). The trial exhibits revealed that Pan American had backcharged 197 Erbauer employees in this manner and that Erbauer had paid Pan American's back-billings of up to ten months in premiums (Pl. Ex. I; S.F. 374).

2. *Derivative Claims.*

Pan American, citing one sentence of the record out of context, advances the contention that Erbauer's claims were identical to the employee's claims. As was clear in the pleadings and

evidence, Erbauer did not sue as a derivative claimant for the rights of another. Rather, Erbauer sued in its own right for Pan American's misrepresentations of coverage *and* false allegations in the open market that the employee's claim was denied because of Erbauer's failure to pay premiums. Such actions caused grave and foreseeable damages to Erbauer's ability to do business.

These distinctions were noted in the court of appeals' opinion (App. 4-17) and expressly noted in the dissent: "Erbauer sued in its own right for damages it sustained as a result of Pan American's mishandling of Dewey Gill's claim for benefits, and not expressly on behalf of its employee, the beneficiary" (App. 23).

REPLY

1. *The Questions Presented Were Properly Raised Before the Texas Supreme Court.*

Pan American begins its brief with the contention that the questions presented are not properly raised here since they were not decided by the Texas Supreme Court. In the first page of its brief under "Questions Presented," Pan American states: "[t]hese questions were not decided below and are not properly presented here." *See* Brief in opposition at i. In this argument, Pan American has misconstrued the basis of this Court's jurisdiction.

There can be no question that Erbauer raised the jurisdictional question at all appropriate stages of the state court proceedings. Pan American never asserted its ERISA preemption argument in the trial court. When Pan American first asserted ERISA preemption on appeal, Erbauer raised the same argument it advances here — that is, ERISA was never intended to and cannot preempt state law claims of a party whom Congress did not empower to bring a civil action under ERISA; and that to so hold would leave Erbauer without a remedy. Erbauer's jurisdic-

tional challenge to Pan American's ERISA argument is noted in the dissent to the court of appeals' opinion (App. 22).

Further, when Pan American raised the ERISA preemption argument in its application for writ of error (a petition for discretionary review) before the Texas Supreme Court, Erbauer discussed in great detail in all response briefs the same jurisdictional challenges to ERISA preemption. *See* Brief of Respondent (in record below) at 9-22. In order to decide that ERISA preemption applied, the Texas Supreme court necessarily ruled against Erbauer's jurisdictional challenges.

Where, as here, the ERISA preemption argument was presented by Pan American and resolved by the Texas Supreme Court, there can be little doubt that the question of ERISA preemption is properly before the Court. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio,* 360 U.S. 423, 436-37 (1959).

If, as here, the question has been properly raised before the state court, the question is regarded as adequately presented for the purposes of this Court's jurisdiction. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). It is not essential that the state court expressly deny the claim if "the necessary effect of the judgment has been to deny the claim." *Id.* The Texas Supreme Court's failure to articulate its denial of Erbauer's jurisdictional challenges is just as reviewable as an express decision on the point. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Street v. New York*, 394 U.S. 576, 581-85 (1969). If *either* the question was raised before the state court *or* the question was resolved by the state court, the question is properly presented and reviewable. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983).

Moreover, since the motion for rehearing was Erbauer's first and only opportunity to challenge the constitutionality of the

finding of ERISA preemption, the constitutional question of denial of rights of access to the courts is properly presented. *See Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930). This is true even though the Texas Supreme Court denied rehearing without comment. *Id.; see also Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Cole v. Arkansas*, 333 U.S. 196, 200 (1948).

Thus, Pan American's contention that the questions are not properly presented is unfounded.

2. *The Texas Supreme Court's Flawed Jurisdictional Analysis Conflicts with Numerous Opinions.*

Pan American next contends that there is no conflict. Pan American's contention is belied by the dissent in the court of appeals on which Pan American relies. In that dissent, Justice Dunn herself noted the conflict, but said "[h]owever, as stated above, most courts, including the Fifth Circuit, have expressly rejected the notion of extending ERISA's reach to parties other than those specified in the statute" (App. 24).

The problem in the Texas Supreme Court's jurisdictional analysis is that it did not consider these cases in its determination of ERISA's preemptive reach. The Texas Supreme Court held that since Erbauer's claims related to an ERISA plan, those claims were preempted — even though Congress did not extend ERISA jurisdiction to parties not enumerated in its express jurisdictional grant. (App. 3). Thus, the Texas Supreme Court improperly interprets the limits of ERISA jurisdiction.

The Texas Supreme Court's broad-brush approach to preemption conflicts with the great number of cases which hold that ERISA jurisdiction cannot extend to parties not enumerated in the ERISA statute. *See, e.g., Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 964, 967 (1st Cir. 1989); *Pressroom Unions Fund v. Continental Assurance*, 700 F.2d 889,

892 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Plucinski v. I.A.M. National Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989); *Provident Life and Accident Ins. Co. v. Waller*, 906 F.2d 985, 987-88 (4th Cir.), *cert. denied*, 111 S. Ct. 512 (1990); *Hermann Hospital v. MEBA Medical Benefits Plan*, 845 F.2d 1286, 1288 (5th Cir. 1988); *Great Lakes Steel v. Deggendorf*, 716 F.2d 1101, 1105 (6th Cir. 1983); *Giardono v. Jones*, 867 F.2d 409, 413 (7th Cir. 1989); *Gulf Life Ins. Co. v. Food Employers*, 809 F.2d 1520, 1524 (11th Cir. 1987); *Grand Union Co. v. Food Employers Labor Relations*, 808 F.2d 66, 71 (D.C. Cir. 1987); *Central States Southeast & Southwest Areas Pension Fund v. Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38, 46-48 (D. Minn. 1980), *aff'd sub nom*, 642 F.2d 1122 (8th Cir. 1981); *Munoz v. Prudential Ins. Co. of America*, 633 F. Supp. 564, 570-71 (D. Colo. 1986). That approach would require Erbauer to proceed with its litigation in the very federal courts which have expressly stated nonenumerated ERISA parties may not proceed. *Hermann Hospital*, 845 F.2d at 1288.

The Texas Supreme Court's approach also conflicts with the opinion of this Court, since the Texas court did not consider whether Erbauer was a party to whom the express grant of ERISA jurisdiction applied. *See Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21, 25-26 (1983) (ERISA preemption removal jurisdiction limited to suits by enumerated parties).

Further, the Texas Supreme Court's approach conflicts with congressional intent, which modeled ERISA preemption on the preemption provisions of the Labor Management Relations Act (LMRA). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). Under a proper LMRA jurisdictional analysis, a court must consider whether Congress provided an alternative federal remedy for the challenged conduct. *United Const. Workers v. Laburnum Const. Corp.*, 347 U.S. 656, 665 (1954). If no

alternative federal remedy is provided, then preemption cannot apply. *Id.* at 668. Here, the Texas Supreme Court erroneously held that Erbauer's claims were preempted, despite the fact that Erbauer, as a nonfiduciary employer, has no right to sue under ERISA. *See* 29 U.S.C. § 1132(a) ("Persons empowered to bring a civil action").

Pan American believes that the Texas Supreme Court's approach was proper. Pan American would have courts apply ERISA preemption without regard to whether a party is included within the express grant of ERISA jurisdiction and without regard to whether a party is provided an alternative federal remedy under ERISA. Pan American would have the state courts find ERISA preemption and then leave it to the federal district courts to later determine ERISA jurisdiction.

Pan American's "cart-before-the-horse" approach creates a very serious error in statutory interpretation. A court cannot determine the limits of ERISA preemption without a prior determination of the limits of ERISA jurisdiction. To find ERISA preemption in the absence of ERISA jurisdiction, as here, is to disregard congressional intent.

Pan American has chosen this approach as its only escape route; for, if a court were required to determine whether a party's suit fell within the express grant of ERISA jurisdiction, Pan American would be unable to sustain its ERISA preemption argument. *See Franchise Tax Board of California*, 463 U.S. at 21. There exist no findings of fact or conclusions of law that Erbauer was a "fiduciary" or other "enumerated party" to whom the ERISA grant of jurisdiction applies. By its failure to assert ERISA as an affirmative defense or request findings of fact or conclusions of law, Pan American waived this point. *See* Tex. R. Civ. P. 299. Moreover, even if Pan American had requested findings necessary to sustain ERISA jurisdiction, the uncontroverted evidence reveals that such a request would have been

denied. *See* Petition for Writ of Certiorari at 7-8. Erbauer, as a nonfiduciary employer, is not included within the grant of ERISA jurisdiction. *See Giardono v. Jones,* 867 F.2d 409, 412-13 (7th Cir. 1989).

The Texas Supreme Court's holding extends far beyond the facts of this case. Henceforth, if this Court does not grant review, ERISA jurisdiction will be ignored in the ERISA preemption formula. All of those hundreds of thousands of tort victims, to whom the ERISA grant of jurisdiction was never meant to apply, will have their rights preempted without an alternative federal remedy. Insurance companies, like Pan American, will be freed to commit all manner of tortious conduct upon such parties with impunity.

Under the proper jurisdictional analysis, this result can be avoided. To guide the courts below and to protect the rights of employers and other nonenumerated parties, Erbauer asks this Court to consider and resolve the questions presented.

CONCLUSION

Petitioner, Erbauer Construction Corporation, respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

WAYNE FISHER
Counsel of Record

DAVID W. HOLMAN

FISHER, GALLAGHER & LEWIS
70th Floor
1000 Louisiana
Houston, Texas 77002
(713) 654-4433

DON A. WETZEL

WETZEL & HERRON
Suite 300, The Millside Building
2170 Buckthorne Place
The Woodlands, Texas 77380
(713) 363-5050

Attorneys for Petitioner

ERBAUER CONSTRUCTION CORPORATION